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No. 274

In the Supreme Court of the United States

OCTOBER TERM, 1965

THE HONORABLE CASPER PLATT, CHIEF JUDGE, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ILLINOIS,
Petitioner,

v.

MINNESOTA MINING AND MANUFACTURING COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF MINNESOTA MINING AND MANUFACTURING COMPANY IN OPPOSITION

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BRIEF OF MINNESOTA MINING AND MANUFACTURING COMPANY IN OPPOSITION

PREVIOUS OPINIONS

Petitioner's[1] original Memorandum and Order denying defendant's motion to transfer is reported unofficially in

[1] Throughout this brief, Judge Platt is referred to as "petitioner"; Minnesota Mining and Manufacturing Company as "defendant"; the petition for writ of certiorari and appendices thereto are cited "Pet. ....."; and the printed appendix of Minnesota Mining and Manufacturing Company in the Court of Appeals (copies of which are filed herewith) is cited as "R. ....."

1962 Trade Cases ¶ 70,455 (E.D. Ill. 1962) and is reprinted here (Pet. 36-46 and R. 8-18). The decision of the Court of Appeals vacating the original order is reported at 314 F.2d 369 (7th Cir. 1963) (R. 19-36). The decision of this Court ordering remand to the district court is reported at 376 U.S. 240 (1964) (R. 37-43). Petitioner's second Order denying transfer is not reported (Pet. 34-35 and R. 6-7). The second opinion of the Court of Appeals is reported at 345 F.2d 681 (7th Cir. 1965) (Pet. 15-33).

QUESTION PRESENTED

Whether the issuance of a writ of mandamus by the Court of Appeals to correct a clear abuse of discretion by the trial court was in disregard of the prior decision of this Court.

RULES AND STATUTES INVOLVED

In addition to Rule 21(b) of the Federal Rules of Criminal Procedure (Pet. 2) the following statutory provisions are involved:

All Writs Act, 28 U.S.C. § 1651(a) which provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

28 U.S.C. § 2106 which provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

COUNTERSTATEMENT

This counterstatement is limited to a brief analysis of what happened on remand.[2] The relevant facts underlying the motion to transfer are set forth in the footnotes to the opinions of the Court of Appeals (Pet. 17-21 n. 3; 314 F. 2d 369, 375 n. 3 (R. 29-30)).

In accordance with this Court's earlier opinion, *Platt* v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 246 (1964) (R. 37-42), the Court of Appeals vacated petitioner's order denying transfer, and remanded the case to him

> "for reconsideration . . . of the motion of . . . defendant . . . for transfer to the . . . District of Minnesota, without reference to the ability of the United States to receive a fair and impartial trial in Minnesota" (R. 44).

The decision of this Court and the mandate of the Court of Appeals obviously contemplated a reconsideration of the record (which is completely documentary) without reference to the improper criteria previously considered. A number of circumstances make it abundantly clear, however, that petitioner failed and refused to reconsider defendant's motion as directed.

Petitioner failed to give proper consideration to the undisputed record facts. His attitude in reconsidering the motion is reflected in his remarks at the outset of the rehearing when he actually suggested that the mandate of

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[2] Defendant does not accept the petition's description or interpretation of the previous decisions in this case (Pet. 3-8) and its analysis of these decisions is included in Sections I and II, *infra*.

the Court of Appeals "evidently puts it [the motion] back in my lap without any affidavits or anything else" (R. 254). And there is nothing stated in his opinion on remand (R. 6) indicating a review of the original affidavits and record which overwhelmingly favored transfer. Moreover, petitioner's answer to the second rule to show cause, insofar as it attempts to set forth a factual basis for denying transfer, is in all material respects a verbatim copy of the answer submitted in the original mandamus proceedings, omitting only the remarks concerning the "fair trial" issue. (*Compare* Pet. 31-33 *with* R. 181-83).

Petitioner's failure to give full effect to the mandate is perhaps explained by the resentment he displayed on rehearing toward the Court of Appeals' first decision which he said was "reversed now," "deliberately refused to give me any discretion," "made remarks that were wholly uncalled for" and which showed "that they had an antagonistic attitude towards . . . [my] decision" (R. 286-88).

Under these extraordinary circumstances which were accompanied by an undisputed record requiring transfer, the Court of Appeals came to the inevitable conclusion that petitioner, in refusing transfer, abused his discretion and that "this case is one in which the correction of that abuse"—by the issuance of a writ directing transfer—"would serve to give effect to rule 21(b) and is particularly appropriate for the exercise of mandamus" (Pet. 24).

REASONS FOR NOT GRANTING CERTIORARI

I.

A Writ of Mandamus Directing Transfer Was Not Barred By This Court's Earlier Decision

The petition does not contend that this case is important in terms of the public interest[3] or that petitioner was right in denying defendant's transfer motion.[4] Instead, the petitioner argues that under this Court's earlier decision, the Court of Appeals, in a mandamus proceeding to review a refusal to transfer under Criminal Rule 21(b), "is limited to determining the propriety of the criteria used . . . in considering the transfer motion," and even if the district judge "applied improper criteria," the Court of Appeals can do no more than "remand to the district court" (Pet. 9, 10).

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[3] In fact, the petition implies the absence of any substantial public question by attempting to reserve the right to argue, should certiorari be granted, "the broader question whether mandamus was" "an appropriate means of review of transfer orders" (Pet. 8 n. 5, 2 n. 1). But petitioner expressly waived any right to raise this question when he conceded in the Court of Appeals "the validity . . . for purposes of this proceeding" of using "the extraordinary writ of mandamus as an appropriate means of reviewing decisions on a Rule 21(b) transfer motion." (Brief in Support of Answer to Rule to Show Cause 19 n. 7). Under these circumstances, the footnoted question may not now be raised since "to open here for the first time and in face of the express disclaimer an inquiry into the broader field is not only to deprive this Court of the assistance of a decision below but to permit a shift to ground which the . . . [respondent] had every reason to think was abandoned in the earlier stages of this litigation." *Helvering* v. *Wood*, 309 U.S. 344, 349 (1940).

[4] Nor in his two dissents did Chief Judge Hastings ever state that petitioner's refusal to transfer was a correct decision. Pet. 25-30; 314 F.2d at 375-78 (R. 30-36).

If this theory were valid, a court of appeals would be powerless to correct the grossest abuse of discretion in any criminal case involving transfer motions. There would be no end to litigation of this kind no matter how persistent and clear the abuse by the district court. Under this theory, even if on remand the district court had again denied transfer for the same concededly improper reason—the alleged difficulty of obtaining a fair trial in Minnesota—the Court of Appeals still could not have directed transfer. Nothing in this Court's earlier opinion even suggests an intention to promulgate a rule with such startling implications. That opinion simply held that the writ of mandamus directing transfer then was improper because it deprived the trial judge of the initial opportunity to decide a Rule 21(b) transfer motion in light of *only* proper criteria. Since petitioner initially had considered a concededly inappropriate factor, this Court said that the Court of Appeals, instead of directing transfer at that time, should only have determined the "appropriate criteria" and left their "application to the trial judge on remand." 376 U.S. at 245 (R. 41).

The opinion, however, did not purport to circumscribe the "supervisory control of the District Courts by the Court of Appeals . . .," *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 259 (1957), or to limit the scope of review or nature of relief that could be granted *under different circumstances* such as where the trial judge clearly abuses his discretion in the *application* of proper criteria. When the Court of Appeals issued its second writ directing transfer—the one now challenged—the circumstances were entirely different from those in the earlier mandamus proceeding. Petitioner had been given a second opportunity to consider defendant's 21(b) motion in light of proper criteria. However, instead of properly exercising his

discretion, he has now for a second time clearly abused his discretion and an order directing transfer is necessary as an effective remedy.

Furthermore, the inflexible rule urged by petitioner directly conflicts with decisions and statements of this Court, after as well as before its decision in this case, that "the writ is appropriately issued . . . when there is . . . clear abuse of discretion," and its "issuance . . . is itself generally a matter of discretion," *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110, 111-12 n. 8 (1964); and that mandamus lies to correct "an abuse of the petitioner's [district court's] power" particularly ". . . '[W]here the subject concerns the enforcement of the . . . [r]ules which by law it is the duty of this Court to formulate and put in force' . . ." *LaBuy* v. *Howes Leather Co.*, 352 U.S. at 256.[5]

The Court of Appeals' discretionary *power* to issue a writ of mandamus directing entry of a transfer order is implicit in the All Writs Act, 28 U.S.C. § 1651(a) and is made explicit in 28 U.S.C. § 2106[6] which provides a broad grant of power to the appellate courts and clearly authorizes the Court of Appeals to enter an order which, in the

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[5] See also, *McCullough* v. *Cosgrave*, 309 U.S. 634 (1940); *Los Angeles Brush Mfg. Corp.* v. *James*, 272 U.S. 701, 706 (1927); *United States* v. *Igoe*, 331 F.2d 766, 768 (7th Cir. 1964), *cert. denied*, 380 U.S. 942 (1965).

[6] Pertinent portions of 28 U.S.C. § 2106 provide: "The Supreme Court or any other court of appellate jurisdiction may . . . vacate . . . any . . . order of a court lawfully brought before it for review, and may . . . direct the entry of such appropriate . . . order . . . as may be just under the circumstances."

interest of justice, is required to effectuate a right the district court wrongfully refuses to acknowledge.[7] Coupled with the remedial powers of the mandamus writ, this statute affords the courts of appeals an operative mechanism for insuring that the federal trial courts comply with the procedural rules promulgated by this Court.

This Court's prior decision was certainly not intended to repeal Criminal Rule 21(b) or to thwart its announced purposes and plain language that a criminal case "*shall*" be transferred if in the interest of justice in contrast to the permissive "may" be transferred in 28 U.S.C. § 1404, the civil transfer statute. The purpose of the Rule, to provide "that the defendants would have some rights in . . . [the selection of the place of trial]"[8] was to prevent the previously permitted arbitrary and capricious action by the prosecution, particularly in multi-venue antitrust cases, of selecting a forum with little or no connection with the litigation and far removed from the "records, officers,

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[7] Criminal Rule 21(b) does not limit the power of a court of appeals under § 2106. In *Bryan* v. *United States*, 338 U.S. 552, 559 (1950) this Court held that when a district court has not properly applied a Criminal Rule (Rule 29(a) in that case) "that is an error of law for which the Court of Appeals may reverse and remand. But when the Court of Appeals remands, [the] Rule . . . does not control its directions to the District Court. The Court of Appeals must look to . . . § 2106 for guidance as to the kind of order which it may direct the District Court to enter."

[8] *United States* v. *E. I. duPont deNemours & Co.*, 83 F. Supp. 233, 234 (D.D.C. 1949).

personnel and counsel'"[9] of the defendant.[10] Yet petitioner here implies that this Court's remarks in its opinion concerning the "discretionary function" of the "trial judge" give him capricious and arbitrary power to determine transfer motions devoid of any legal or judicial limits and without regard to any applicable standards. This Court's previous opinion specifically did not change the applicable standards or criteria of Rule 21(b) "assuming, without deciding . . . [the] validity for the purposes of this case" of the nine factors which both parties and the Court of Appeals agreed were "appropriate" 376 U.S. at 244 (R. 40). If Rule 21(b) is to continue to be a "valuable tool of justice" *United States* v. *Cores*, 356 U.S. 405, 410 (1958), the courts of appeals must insure that district courts apply the proper standards within the bounds of *judicial discretion.* Such discretion is "impartial reasoning, guided and controlled in its exercise by fixed legal principles" and is "the opposite of caprice and arbitrary action."[11]

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[9] *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. at 246 (R. 42).

[10] This practice of indicting in distant districts has been characterized by a member of the Advisory Committee on the Criminal Rules as "pretty shabby business for the great government of the United States to indulge in" and a primary purpose of Rule 21(b) was to prevent this practice. Federal Rules of Criminal Procedure, N.Y. University School of Law Institute, Proceedings, Vol. VI, 168-170, 224-225, 274-275 (1946). Accord: *United States* v. *North American Van Lines, Inc.*, 1962 Trade Cas. ¶ 70,283 (D.D.C. 1962); *United States* v. *General Motors Corp.*, 194 F.Supp. 754, 757 (S.D. N.Y. 1961); *United States* v. *Erie Basin Metal Prods. Co.*, 79 F. Supp. 880, 885 (D.Md. 1948); *United States* v. *National City Lines, Inc.*, 7 F.R.D. 393, 395-398 (S.D. Cal. 1947).

[11] *Dixie Cup Co.* v. *Paper Container Mfg. Co.*, 174 F.2d 834, 836 (7th Cir.), *cert. denied*, 338 U.S. 867 (1949).

The Court of Appeals has not disregarded this Court's opinion; on the contrary, its actions have been consistent with the opinion, the letter and spirit of Criminal Rule 21(b), and the limited use of mandamus as an extraordinary remedy for ". . . the enforcement of the . . . Rules." *LaBuy* v. *Howes Leather Co.*, 352 U.S. at 256; *Schlagenhauf* v. *Holder*, 379 U.S. at 112.

II.

Proceedings In The Trial Court Demonstrate A Clear Abuse of Discretion

The petition candidly and necessarily concedes that the record in this case would support "a decision in favor of transfer" (Pet. 13). The Court of Appeals has summarized (Pet. 17-21 n.3) the defendant's detailed and undisputed factual showing[12] that the Minnesota district rather than the Eastern District of Illinois is the just and proper place of trial with respect to all the agreed criteria of the interest of justice: location of parties and records, events in issue, contact between defense counsel and de-

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[12] It is noted (Pet. 7 n. 4) with apparent cynicism that the Court of Appeals relied upon defendant's brief for the factual recitation in its opinion, but nowhere does the petition or the dissenting opinion challenge even a single one of the facts there recited. Indeed, as the Court of Appeals pointed out: "neither at the original hearing in the district court, nor upon remand, did the government offer any evidence to refute the foregoing facts" (Pet. 18). This statement is likewise unchallenged in the petition, and the facts are undisputed. Hence, there is no issue of *de novo* determination by the Court of Appeals. Rather, the question is whether there has been a refusal to apply, or a misapplication of, established principles of law to undisputed or conceded facts, each of which has been held to be an abuse of discretion. *Union Tool Co.* v. *Wilson*, 259 U.S. 107, 112 (1922); *Bowles* v. *Simon*, 145 F.2d 334, 337 (7th Cir. 1944).

fendant's executives, disruption of business, unjustifiable expense, convenience of witnesses, and docket conditions.

In sharp contrast to this undisputed factual showing is the absence of any showing of justification for trial in the Illinois district. For example, despite defendant's repeated attempts to obtain from the government any factual basis for trial in Danville (R. 70, 80, 87), *the record is still devoid of any competent evidence locating a single government or defense witness—not one—in the entire Eastern District of Illinois.* This is in the face of defendant's undisputed evidence disclosing the existence and specific location of 99 potential government witnesses and the greater ease and facility by which such witnesses could reach Minnesota for trial, as compared to the inconvenience of Danville (R. 184-87, 204-05). This evidence was totally ignored in favor of a general affidavit of government counsel that asserted the cloak of grand jury secrecy as an excuse for the government's failure to offer facts even as to location, let alone names or other identification, of witnesses (R. 143, 195).[13] The determination of the interest of justice from specific *facts* submitted by the

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[13] Government counsel attempted to explain away examples of instances where disclosure of both identity and location of prospective government witnesses was made by the Antitrust Division in opposition to transfer motions (R. 206-207, 210-250) as "mistakes" (R. 277). Petitioner, himself, in his *initial* decision confessed that Minneapolis-St. Paul would be "more convenient" for defense witnesses and that "as to other witnesses the question of convenience is not so easily determined." (Pet. 40). Yet in his second decision, he insists that "due credence" be given to the conclusions and opinions of government counsel's affidavit concerning this question—an affidavit in the same language quoted in *his* initial decision and from which he said he could not determine the question (Pet. 35; R. 143, 195).

parties is the judicial function under Rule 21(b).[14] The trial court's willingness here to give "credence" to government counsel's conclusory affidavit was a delegation of the judicial function to counsel for the prosecution. See *Aguilar* v. *Texas*, 378 U.S. 108, 111-15 (1964). A result based on such complete abdication of judicial discretion is clearly amenable to the Court of Appeals' power of mandamus. *LaBuy* v. *Howes Leather Co.*, 352 U.S. at 256.

Likewise, analysis of the answer to the rule to show cause destroys every other asserted justification for trial in Danville (Pet. 30-33). Petitioner's concern for an early trial, also available in the transferee district (R. 208-209), stemmed from acceptance of government counsel's judgment of defendant's guilt and its effect on defendant's competitors (Pet. 31). The increase in government expense is completely conjectural without any record basis other than conclusory oral allegations (R. 278; Pet. 32). Transportation of the grand jury documents to Minnesota would cost only $50 (R. 13, 125-26). No record support for denial of the transfer motion having been shown, and in the face of uncontradicted evidence requiring transfer, refusal to enter the appropriate transfer order necessitated the use of the extraordinary writ directing transfer. *Chicago R.I. & Pac. R.R. Co.* v. *Igoe*, 220 F.2d 299, 304 (7th Cir.), *cert. denied*, 350 U.S. 822 (1955).

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[14] Just as the "good cause" requirement of Civil Rule 35 requires "discriminating application by the trial judge," and is not satisfied "by mere conclusory allegations," *Schlagenhauf* v. *Holder*, 379 U.S. 104, 118 (1964), so too the "interest of justice" requirement of Criminal Rule 21(b) must require the district court to make a discriminating application of the relevant criteria to the record *facts*.

Petitioner further abused his discretion by brushing aside expense and inconvenience criteria previously prescribed by the Court of Appeals and unchallenged at any stage of these proceedings, and by insisting upon the use of criteria for comparing docket conditions which the Court of Appeals had previously rejected (Pet. 23-24). In these circumstances, it was plainly incumbent upon the Court of Appeals to issue the mandamus writ to prevent usurpation of its "supervisory control of the District Court[s] . . ." which this Court has acknowledged it possesses. *LaBuy* v. *Howes Leather Co.*, 352 U.S. at 259-60.

1. *Unjustified Expense and Inconvenience* — Expense and inconvenience to the parties are factors which this Court considered relevant in determining a Rule 21(b) transfer motion. 376 U.S. at 244, 246 (R. 40, 42). The government argued at the second hearing that the defendant's ability to absorb the undenied additional expense to it of at least $100,000 which a Danville trial would require (Pet. 22 n. 4) was a relevant consideration warranting denial of transfer. In other words, a large successful corporation should be denied a right to which a smaller one would be entitled. Indeed, the petition makes the strange argument that "while the financial strength of the defendant is not an affirmative justification for trial in Illinois, *it is a relevant factor in determining how great a burden trial in that district would be*" (Pet. 11) (emphasis added). In short, if a defendant can survive the expense, let him incur it, no matter how unnecessary.

Only by the adoption of a rule that mocks even the principle of "equal justice under law," 28 U.S.C. § 453, could defendant's undisputed showing of substantial expense, inconvenience and hardship be so minimized and ignored. The petition has cited no authority for the rule

of law now proposed, nor is there any.[15] Rule 2 of the Federal Rules of Criminal Procedure dictates that those rules are to be construed to eliminate "unjustifiable expense," yet the construction urged upon and adopted by petitioner defies that dictate.

The Court of Appeals correctly observed that petitioner's statement that ". . . interruption of the business and expense of defendant have been overemphasized" (Pet. 35; R. 7) indicates "something less than a fair consideration of salient parts of . . . [defendant's] case on remand" (Pet. 23). Faced with such bases for denial of transfer, the Court of Appeals was forced to conclude that the only appropriate remedy for the abuse of discretion was a direct order to transfer.

2. *Docket Conditions* — In its first opinion in this case, the Court of Appeals set forth the standard for properly evaluating the comparative status of the dockets in the two forums — the average case load in the district per judge. 314 F. 2d at 375 n. 3 (R. 30). However, in defiance of this standard which again, upon remand, showed the average case load to be slightly less in Minnesota than in the Eastern District of Illinois (R. 209), petitioner himself presented evidence at the rehearing which considered only Danville instead of all of the Eastern District (R. 254-255). Petitioner's deliberate refusal to apply properly a

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[15] District court opinions holding that size and wealth of a corporation cannot be used to justify denial of a transfer motion include *United States* v. *North American Van Lines, Inc.*, 1962 Trade Cas. ¶ 70,283 (D.D.C. 1962); *United States* v. *General Motors Corp.*, 194 F. Supp. 754, 756 (S.D.N.Y. 1961); *United States* v. *American Natural Gas Co.*, 1959 Trade Cas. ¶ 69,265 (E.D. Wis. 1959); and *United States* v. *National City Lines, Inc.*, 7 F.R.D. 393, 398, 402-03 (S.D. Cal. 1947).

factor formulated by the Court of Appeals in full accordance with its function of determining "appropriate criteria," as specified by the Supreme Court, 376 U.S. at 245 (R. 41), is the kind of judicial abuse which is likewise amenable to correction by mandamus directing transfer.

CONCLUSION.

Petitioner has been afforded the opportunity to reconsider defendant's transfer motion in the light of the appropriate and proper criteria of the interest of justice determined by the Court of Appeals. However, his actions on remand have convinced the Court of Appeals that he flouted and defied its mandate, misapplied and refused to apply the relevant criteria, refused to transfer this case in the face of an undisputed record which overwhelmingly required it, and for all these reasons clearly abused his discretion in applying the rules formulated by the Supreme Court; thus this case is particularly appropriate for issuance of a writ of mandamus directing entry of an order of transfer.

For the reasons stated herein, it is respectfully urged that the petition for writ of certiorari be denied.

Respectfully submitted,

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